No. 48443-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MARGARET M. HOUSE,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Comes now the Appellant, Margaret M. House, Plaintiff below, by and through her attorney of record, Jenna N. Savage of the Law Offices of David B. Vail, Jennifer Cross-Euteneier and Associates, and hereby offers this brief in support of her appeal.

This case originates under RCW Title 51, the Industrial Insurance Act ("the Act") from an Administrative Law Review (ALR) appeal from a March 2, 2015 Decision and Order of the Board of Industrial Insurance Appeals ("the Board"). The Board concluded that the Department of Labor and Industries ("the Department") properly excluded Ms. House's unemployment compensation from her wage rate calculation for temporary total disability benefits ("time-loss") in its May 7, 2013 wage order.

Ms. House appealed that decision to Superior Court asserting that the Board had erred in not requiring the Department to include her unemployment compensation in her wage order as a result of the Board's misapplication of the law and policy of the Act. The Superior Court affirmed the Board's decision after considering briefing and oral argument. Judgment was entered on December 18, 2015.

As will be described further below, the law and policy of the Act leads to the conclusion that the Department should include the

unemployment compensation Ms. House was receiving at the time of her industrial injury in her wage order, in order to adhere to the underlying purpose and policy of the Act of reducing economic harm to injured workers. The Superior Court's decision, affirming the Board, undercuts the purpose and policy of the Act by holding that Ms. House is not entitled to have this unemployment compensation included in her wage order, thereby, causing Ms. House to suffer an unnecessary and unjust economic loss.

II. ASSIGNMENTS OF ERROR

A. The Superior Court, and the Board, erred in entering Finding of Fact 1.2 determining that a preponderance of the evidence supported the Board's Findings of Fact, and adopting the Board's Findings of Facts Nos. 1 through 7, insofar as a preponderance of the evidence does not support all of the Board's Findings of Fact, or the adoption of all Findings of Fact Nos. 1 through 7.

B. The Superior Court, and the Board, erred in entering Finding of Fact 1.25 determining that the unemployment compensation benefits paid to Ms. House prior to her industrial injury were not made as the result of a contract for hire with her employer, and were not payments for board, housing, fuel, or other consideration of like nature, insofar as it incorrectly concludes that her unemployment compensation benefits are not other consideration of like nature under within the meaning of the statute.

C. The Superior Court, and the Board, erred in entering Finding of Fact 1.27 determining that the Department correctly calculated Ms. House's wages and time-loss benefits, insofar as the Department's calculation does not include her unemployment

compensation benefits, which should be deemed other consideration of like nature within the meaning of the act, and this calculation is therefore not reflective of Ms. House's lost earning capacity, and fails to fulfill the purpose of the Act of reducing economic harm to her as an injured worker.

D. The Superior Court, and the Board, erred in entering Conclusion of Law 2.2, adopting the Board's Conclusions of Law Nos. 1 through 3, insofar as not all of the Board's conclusions of law are consistent with the relevant case law and policy interpreting the portions of the Act at issue in this case.

E. The Superior Court, and the Board, erred in holding that the unemployment compensation Ms. House was receiving at the time of her industrial injury is not wages and is not consideration of like nature received from and employer as part of the contract for hire within the meaning of RCW 51.08.178, insofar as relevant case law and policy dictate that Ms. House's unemployment compensation does constitute wages, because it is in fact other consideration of like nature, because it is a readily identifiable and reasonably calculated in-kind in component of her lost earning capacity that is necessary to protecting her basic health and survival in Conclusion of Law 2.22.

F. The Superior Court, and the Board, erred in determining that the Department order dated October 7, 2013 is correct insofar as the Department failed to include Ms. House's unemployment compensation in the wage order in Conclusion of Law 2.23.

G. The Superior Court, erred in determining that the Board's March 2, 2015 Decision and Order is correct insofar as it misapplied the relevant law and policy of the Act, and affirms the Department order dated October 7, 2013, which affirmed the Department order of May 7, 2013, which improperly calculated Ms. House's wage rate without inclusion of her unemployment compensation benefits in Conclusion of Law 2.3.

H. The Superior Court, and the Department, erred in determining that the October 7, 2013 Department Order, which affirmed the May 7, 2013 Order establishing Ms. House's wages of injury based on $13.05 an hour, four hours a day, five days a week for $1,48.40 a month was correct, insofar as the Department improperly excludes Ms. House's unemployment compensation from her wage rate calculation.

III. ISSUE

Whether the Department of Labor and Industries should have included Margaret M. House's unemployment compensation that she was receiving at the time of her industrial injury, when calculating her wage rate.

IV. STATEMENT OF THE CASE

On October 4, 2010, Margaret M. House suffered an industrial injury while working for the City of Roy. CP[1] at 3, 64. Ms. House filed a claim for her injuries, and that claim was accepted. CP at 64. Ms. House was unable to continue to work, so she began receiving temporary total disability, or time loss compensation, as part of her Labor and Industries claim. CP at 3, 64.

Ms. House began working for the City of Roy in 2008 and was hired on a full-time basis. CP at 2, 64. During her time with the City of Roy, she worked as a landscaper and water quality tester. CP at 2, 64. In 2009, Ms.

[1] The record of proceedings in this case is the Clerk's Papers. This will be cited CP.

House's hours were involuntarily reduced by the city to part-time, due to budgetary concerns. CP at 2, 64. Ms. House continued to work for the City on a part-time basis, but also filed for and received unemployment compensation based on the reduction of her hours with the City. CP at 2-3, 64. After Ms. House began receiving time loss benefits as part of her Labor and Industries claim, her unemployment compensation was terminated. CP at 3.

On May 7, 2013, the Department of Labor and Industries issued a wage order, setting Ms. House's wages at $1,148.40 per month. CP at 2. The Department calculated this wage rate by multiplying the hourly rate of $13.05 per hour, 4 hours per day, 5 days per week. CP at 2. This wage order did not include Ms. House's unemployment compensation. CP at 8, 64.

On July 2, 2013 the claimant filed a protest and request for reconsideration of the May 7, 2013 wage order. CP at 149. On October 7, 2013 the Department affirmed the May 7, 2013 wage order, and on November 25, 2013 the claimant filed a timely appeal with the Board of Industrial Insurance Appeals. CP at 63, 151. On January 6, 2014 the Board issued an order granting Ms. House's appeal. CP at 85.

On October 16, 2014, Industrial Appeals Judge Greg Duras issued the Proposed Decision and Order, which reversed and remanded the case to the Department include Ms. House's unemployment compensation as part

of her wages. CP at 63, 69. On December 2, 2014, the Department submitted a petition for review of the Proposed Decision and Order, arguing that the Department correctly excluded Ms. House's unemployment compensation from her wage calculation. CP at 38. On January 2, 2015, the Claimant submitted a response to the Department's Petition for Review, arguing that the Proposed Decision and Order was correct, and Ms. House's unemployment compensation should be included in her wage calculation. CP at 29. On December 19, 2014 the Board granted the petition for review. CP at 35. On January 15, 2015 the Board issued a Decision and Order, which affirmed the Department order excluding Ms. House's unemployment compensation. CP at 2.

The Board's decision was then appealed to Pierce County Superior Court and was assigned to the Honorable Judge Elizabeth Martin. CP at 1. Both parties provided trial briefs and presented oral argument. CP at 258. Having considered the briefing and argument, on December 18, 2015, the Court entered Findings of Fact, Conclusions of Law, and Judgment which affirmed the Board's January 15, 2015 Decision and Order, which held that Ms. House was not entitled to have unemployment compensation included in her wage order, and that the Department correctly calculated her wage rate within the meaning of the pertinent sections of the Act. CP at 257-260.

Ms. House has appealed this decision to the Washington State Court of Appeals, Division Two. CP at 263.

V. STANDARD OF REVIEW

The initial step in seeking review of a decision of the Department is to appeal that decision to the Board. RCW 51.52.060. At the Board, the appealing party, in this case Ms. House, had the burden of presenting a prima facie case for the relief it seeks. RCW 51.52.050(2)(a).

When deciding an appeal from a decision of the Board, the Superior Court conducts a de novo review of the Board's decision but relies exclusively on the certified board record. RCW 51.52.115. The Board's findings and decision are prima facie correct and the party challenging the decision has the burden of proof. *Id.* The presumption of correctness is a limited one, meaning that the decision will be overturned if the trier of fact finds from a preponderance of the credible evidence that the findings and decision of the Board are incorrect. *Cantu v. Dep't of Labor and Indus.*, 168 Wn. App. 14, 20-21, 277 P.3d 685 (2012) (internal citations omitted) *see also* RCW 51.52.115. Only if it finds the evidence to be equally balanced does the presumption require the findings to stand. *Id.*

In reviewing the decision from the Superior Court, the role of the Court of Appeals is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether

conclusions of law flow therefrom. *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995). Questions of law are reviewed de novo. *See Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997) (Superior court's legal conclusions are reviewed de novo); *Romo v. Dep't of Labor and Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998).

The Department is charged with administering the Industrial Insurance Act, so the Court of Appeals affords substantial weight to its interpretation of the Act, but the Court of Appeals may nonetheless substitute its judgment for that of the Department's because its review of the Act is de novo. *Dana's Housekeeping, Inc. v. Dep't of Labor and Indus.*, 76 Wn. App. 600, 605, 886 P.2d 1147 (1995).

Here, there is a legal question to be reviewed de novo. Namely, whether the Act, in light of its underlying purpose and policy, require the Department to include the unemployment compensation Ms. House was receiving at the time of her industrial injury in her wage order.

VI. ARGUMENT

A. The Purpose of the Industrial Insurance Act is to be Liberally Construed in Favor of Injured Workers Such as Ms. House.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. It must be emphasized that it has been held

for many years that the courts and the Board are committed to the rule that the Industrial Insurance Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1, 12 (1945); *Nelson v. Department of Labor and Industries*, 9 Wn.2d 621, 628 (1941); and *Hilding v. Department of Labor and Industries*, 162 Wash. 168, 174 (1931).

R.C.W. § 51.04.010 declares "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault". Similarly, R.C.W. § 51.12.010 provides: This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

The Washington Supreme Court has repeatedly stated that, "The Industrial Insurance Act mandates that its provisions be 'liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring during the course of employment' and courts, therefore, are to resolve doubts as to the meaning of the IIA in favor of the injured worker. *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 257, 26 P.3d 903 (2001), citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1995); *Clauson v.*

Dep't of Labor & Indus., 130 Wn.2d 580, 584, 925 P.2d 624 (1996) ("All doubts as to the meaning of the Act are to be resolved in favor of the injured worker."); *Dep't of Labor and Indus v. Johnson*, 84 Wn. App 275, 277-78, 928 P.2d 1138 (1996).

The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987)

Under accepted canons of statutory interpretation, each statutory provision should be read by reference to the whole Act. "We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions." *Guijosa v. Wal-Mart Stores, Inc*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000). Historically, the Court has followed the rule that each provision of a statute should be read together with other provisions in order to determine legislative intent. "The purpose of reading statutory provision in pari material with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provision 'as constituting a unified whole, to the extent that a harmonious, total statutory scheme evolves, which maintains the integrity of the

respective statutes." *In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998), citing *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980).

In the case at hand, Ms. House is the injured worker, and therefore the Court must resolve any doubts as to the meaning of the Industrial Insurance Act in her favor. Thus, the Court must liberally construe the provisions of the Act for the purpose of reducing to a minimum the suffering and economic loss arising from injuries occurring during the course of her employment. For the reasons elaborated upon below, liberal construction in this case dictates that the unemployment compensation benefits that Ms. House was receiving at the time of her industrial injury must be included in her wage order.

B. Ms. House's Unemployment Compensation Should be Included in Her Wage Order because it Constitutes Consideration of Like Nature Under the Terms of the Act.

Upon consideration of both case law and policy, the Superior Court was incorrect in affirming the Board's decision that Ms. House's unemployment compensation was not a wage under the terms of the Act, and therefore her unemployment compensation should not be included as part of her wage order. RCW 51.08.178 sets forth the definition of wages and the method computing a worker's monthly wages as a basis for compensation. The statue reads, in relevant part: "The term 'wages' shall

include the reasonable value of board, housing, fuel or other consideration of like nature received from the employer as part of the contract to hire." RCW 51.08.178.

In interpreting RCW 51.08.178, the Washington State Supreme Court determined that the phrase "other consideration of like nature" contained in RCW 51.08.178 is subject to more than one reasonable interpretation and is therefore ambiguous. *Cockle v Dep't of Labor & Indust.*, 142 Wash.2d 801, 808 (2001). The Court there went on to define the phrase "consideration of like nature" to include benefits that are readily identifiable and reasonable calculated in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival. *Id.*, at 822.

Here, relevant case law shows that Ms. House's unemployment compensation constitutes consideration of like nature under RCW 51.08.178, because it is a readily identifiable and reasonably calculated in-kind component of Ms. House's lost earning capacity at the time of her industrial injury that is critical to protecting her basic health and survival.

1. Ms. House's Unemployment Compensation is a Readily Identifiable and Reasonably Calculated in-kind Component of her Lost Earning Capacity.

Under the abovementioned standard, as laid out by the Court in *Cockle*, Ms. House's unemployment compensation benefits should be included in her wage order. In this case, the unemployment benefit received by Ms. House was readily identifiable because she was actually receiving the payments. Ms. House, at the time of her industrial injury, was receiving wages from the City of Roy and unemployment compensation benefits from the Washington Department of Employment Security.

It is undisputed that once Ms. House's hours were involuntarily reduced to part time, she qualified for and was paid unemployment compensation to compensate for the reduction. She received this benefit, every week. At the time of her industrial injury, she was receiving the unemployment benefits along with her wages from the City of Roy. After her industrial injury, Ms. House began receiving time-loss. Time-loss benefits require that a person be unable to work due to temporary total disability, while on the contrary, in order to receive unemployment compensation, a worker must certify that they are able to work. Because the receipt of time-loss means that Ms. House was unable to work, she was no longer eligible for unemployment benefits. Therefore, once Ms. House

began receiving the time loss benefits, as a result of her industrial injury, she no longer received any unemployment benefits. However, prior to her industrial injury and resulting temporary total disability, unemployment compensation was actually paid to Ms. House every week.

As such, the unemployment compensation here is a readily identifiable and a reasonably calculated amount of money that Ms. House was no longer able to receive because of her industrial injury.

2. Ms. House's Unemployment Compensation is Critical to Protecting her Basic Health and Survivial.

Ms. House's unemployment benefits in this case also satisfy the requirement in *Cockle* of being critical to protecting the injured worker's basic health and survival. Ms. House was originally hired with the City of Roy in a full-time capacity. Then, after over a year of employment, budgetary constraints forced the city to reduce her position to part-time. In order to continue to work for the City, which she enjoyed, but also in order to continue to have money to survive, she was forced to file for and begin receiving unemployment benefits. Now, as a result of her industrial injury, she is no longer eligible for the unemployment benefits that were necessary for her basic health and survival. The money she received from the City of Roy employment was not enough for Ms. House to live. The supplemental

income from her unemployment compensation was necessary to keep her afloat.

As such, the unemployment is a benefit that is critical to protecting her basic health and survival.

C. Ms. House's Unemployment Compensation is Analogous to Dual Employment Under the Law, and Should be Treated as Such.

RCW 51.58.178(1) states that, in calculating a worker's wages, it must be based on the "monthly wages the worker was receiving from all employment at the time of injury." The Board has determined that wages a worker is receiving from all employment, including from jobs other than the job-of-injury, must be factored into the time-loss calculation when that income is also lost as a result of the industrial injury. *In re Kay Shearer*, BIIA Dec. 96 3384 (1998). While unemployment is, by its very definition, not employment, it is another form of income that was lost as a result of the industrial injury. As discussed above, it is undisputed that Ms. House was only receiving unemployment compensation because her hours were involuntarily reduced by the City of Roy. It is also undisputed that Ms. House was receiving the Employment Security Income as well as her wages from the City of Roy at the time of her industrial injury. This was another form of income, which she required to survive due to only part-time working hours, which was lost as a result of the industrial injury.

Therefore, Ms. House's unemployment would be akin to dual employment and should be included in the wage order.

D. Policy Dictates that Ms. House's Unemployment Compensation Should be Included in the Wage Order.

Taking into account both case law and policy, the Department should include employment security income as part of Ms. House's wage order. The Act requires that it be liberally construed in favor of the injured worker, and it should be interpreted to minimize the suffering and economic loss that arises from injuries in the course of employment. RCW 51.12.010. The statute is clear, and it has been stated by the Courts over and over again. It must be the overriding principle in interpreting the Act.

This is a unique case, and the facts of it do not fit nicely into a certain scenario. Ms. House's hours were involuntarily cut by her employer, the City of Roy. In order to keep her employment with the city, and to have enough income to survive, she was forced to file for unemployment compensation. And now, because of her industrial injury, she is again forced to live on the part-time hours from the city, and is unable to supplement that income in any way.

Ms. House represents the type of injured worker that the Act seeks to protect with this liberal construction. Perhaps the unemployment does not fit within the enumerated list provided by the case law or the statute,

but as The Washington State Supreme Court has determined that other consideration of like nature is subject to more than one reasonable interpretation, is ambiguous, and open to judicial interpretation. The Court has emphasized that compensation must be based on the worker's lost earning capacity at the time of injury. Ms. House desired to continue her work with the employer, and as such was forced to supplement her income with unemployment benefits. Now, after her industrial injury, she is no longer eligible for this portion of her monthly income which was necessary for her to survive. The unemployment represents a part of her lost earning capacity. This income, along with her wages from her work with the City of Roy, must be included in the wage order.

To achieve the purpose and spirit of the Act, Ms. House's unemployment benefits should be included in her wage order.

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VII. CONCLUSION

Ms. House respectfully requests that the Court reverse the Superior Court's affirmance of the Board's Decision and Order, which determined that the Department correctly excluded her unemployment compensation from her wage order, and remand this matter to the Department with instructions to include Employment Security Income in Ms. House's wage order.

Ms. House further requests attorney's fees pursuant to RCW 51.52.130.

Dated this 9th day of June, 2016.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and ASSOCIATES

By: Jenna Savage

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CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 9th day of June, 2016, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Susan L. Pierini
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DATED this 9th day of June, 2016.

Lynn M. Venegas

LYNN M. VENEGAS, Secretary